Supreme Court, U.S.
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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AIRBUS INDUSTRIE, ET AL.,
Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Charles W. Schwartz
Thad T. Dameris
Dana C. Livingston
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
Telephone: (713) 758-3852
Facsimile: (713) 758-2346

Jacques E. Soiret
Counsel of Record
KIRTLAND & PACKARD
1900 Avenue of the Stars
Los Angeles, California 90067
Telephone: (310) 552-9700
Facsimile: (310) 552-0192

Counsel for Petitioners

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-7479

LAURA HOWELL LINTON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATES OF ANDREW JAY HOWELL AND SARAH STOLL HOWELL, DECEASED, AND ON BEHALF OF RENA HOWELL, ET AL.,

Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,

Defendants,

AIRBUS INDUSTRIE AND AEROFORMATION,

Defendants-Appellants.

Consolidated With

MR. AND MRS. STAN MOSS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATORS OF THE ESTATE OF ALISON LESLIE MOSS,

Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,

Defendants,

AIRBUS INDUSTRIE AND AEROFORMATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(August 16, 1994)

WIENER, Circuit Judge.

Defendants-Appellants Airbus Industrie, G.I.E. ("Airbus") and its subsidiary, Aeroformation ("AeF"), (collectively "Airbus Defendants") were sued in state court. The Airbus Defendants removed this case to federal court, where they sought immunity from suit under the Foreign Sovereign Immunities Act ("FSIA").[1] Jurisdiction for this removal was based on two distinct grounds: diversity jurisdiction under 28 U.S.C. § 1332, and "federal question" jurisdiction under the FSIA and 28 U.S.C. §§ 1441 & 1330.

In an earlier order, the district court had concluded that the Airbus Defendants did not qualify as instrumentalities of foreign states. The Airbus Defendants immediately appealed that order, but in an unpublished opinion ("*Airbus I*")[2] we dismissed that appeal for lack of jurisdiction and remanded the case to the district court. On remand, the district court concluded that there was no diversity jurisdiction—hence no subject matter jurisdiction—and accordingly remanded the case to state court under 28 U.S.C. § 1447.

Once again the Airbus Defendants are before us seeking review, claiming, *inter alia*, that the FSIA order is an order that may be considered separate from the order to remand under the "separable order" doctrine; hence appellate review of the FSIA order is not precluded by § 1447. As explained below, however, the FSIA order is not "conclusive" and thus not a separable order under controlling jurisprudence. Moreover, as the FSIA order will have no

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[1] Codified at 28 U.S.C. §§ 1602-11.

[2] *Airbus Industrie v. Linton*, No. 92-7564 (5th Cir. Feb. 24. 1993).

preclusive effect on state courts, we can find no injustice here that would warrant recalling our mandate in *Airbus I* so as to consider the merits of that order.

The Airbus Defendants also claim that we may review the remand order because the remand was erroneously based on a "post-removal" event, i.e., a stipulation that effectively made one of the plaintiffs "stateless," thereby destroying diversity jurisdiction. We conclude, however, that § 1447 interdicts our jurisdiction to review remands for lack of subject matter jurisdiction, even if such remands are erroneously based on post-removal events. Accordingly, this appeal is dismissed.

I

FACTS AND PROCEEDINGS

Two sets of plaintiffs sued, among others, the Airbus Defendants in two separate suits in a Texas state court for damages caused by a plane crash in India. The Airbus Defendants removed these cases to federal court, where they were consolidated without objection into one case "for all purposes." The Airbus Defendants asserted two independent bases for jurisdiction: 1) diversity jurisdiction under 28 U.S.C. § 1332, and 2) "federal question" jurisdiction under the FSIA and 28 U.S.C. §§ 1441(d) & 1330(a). Once in federal court, the Airbus Defendants filed a motion for dismissal, claiming that: 1) they were immune from suit under the FSIA; and 2) they were not subject to in personam jurisdiction. In addition, the Airbus Defendants requested dismissal on forum non conveniens grounds. In response, the plaintiffs filed a motion to remand.

In a published order, the district court ruled that neither Airbus nor its subsidiary, AeF, were instrumentalities

of foreign states.[3] The essence of that ruling by the district court is that, even assuming that the interests of several foreign countries may be combined, ("pooling"), the interest of one of the foreign countries here at issue—Germany—could not be included in this particular pool. According to the district court, Germany's interests could not be pooled with the interests of other countries because Germany did not own a majority interest in the companies through which Germany held its ownership interest in the Airbus Defendants ("tiering").[4] Absent inclusion of Germany's interest, neither Airbus Defendant had a majority of its shares owned by a foreign state (or states) as required by 28 U.S.C. § 1603(b)(2).

The Airbus Defendants immediately appealed this order of the district court. In that appeal—*Airbus I*—we dismissed for lack of appellate jurisdiction.[5] We concluded that, although denials of motions to dismiss for lack of FSIA immunity generally are appealable despite their interlocutory nature, the district court had failed to rule on the entirety of the motion before it, specifically, on the issues of jurisdiction in personam and forum non conveniens. In remanding, we required the district court to "rule on plaintiffs' motions to remand and defendants' motions to dismiss expeditiously."[6]

Sometime after we remanded to the district court but before it ruled on the remanded issues, the Airbus Defendants entered into joint stipulations with plaintiffs regarding the residency and travel patterns of certain of those

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[3] *Linton v. Airbus Industrie*, 794 F.Supp. 650 (S.D.Tex. 1992).

[4] *Id.* at 652-53

[5] *Airbus Industrie* v. *Linton*, No. 92-7564 (5th Cir. Feb. 24, 1993).

[6] *Id.*

plaintiffs. Presumably the Airbus Defendants agreed to enter into these stipulations in an effort to bolster their forum non conveniens argument. Unfortunately for those defendants, though, these stipulations were to have an undesired effect.

When the district court did issue its final order on remand from *Airbus I*, it addressed—but did not rule upon—the issues remaining in the Airbus Defendants' motion to dismiss, ruling only on the plaintiffs' motion to remand. After noting that it would have dismissed on either in personam jurisdiction or forum non conveniens grounds, the district court observed that there was "a fly in this ointment." That fly had been spawned by the joint stipulations that had the effect of recognizing one of the plaintiffs to be a "stateless" person for jurisdictional purposes, thereby destroying diversity jurisdiction. As that court's earlier order had rejected the FSIA as a basis for "federal question" jurisdiction, the district court concluded that it lacked subject matter jurisdiction altogether, and remanded accordingly, stating: "It is further ORDERED that Plaintiffs' Motion to Remand is GRANTED FOR LACK OF SUBJECT MATTER JURISDICTION...." Presumably due to its lack of jurisdiction, the district court declined to issue any order or ruling on the Airbus Defendants' motion to dismiss.

Encouraged to do so by the district court,[7] the Airbus Defendants timely appealed; and the district court stayed its remand order pending resolution of this appeal.

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[7] Despite its remand for lack of subject matter jurisdiction, the district court believed that the FSIA Order was separable and appealable, stating:

> As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ("FSIA").

II
DISCUSSION

A. *Jurisdictional Bar of § 1447(d) and the FSIA*

Subsection (c) of § 1447 provides in pertinent part that: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded."[8] Subsection (d) of that same section provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[9] The Supreme Court has made abundantly clear that subsection (d) operates as an absolute bar to appellate review, stating that § 1447(d) speaks in terms of an "unmistakable command" so as to preclude review of remands for grounds stated in § 1447(c) "by appeal, mandamus, or otherwise."[10]

Albeit under distinguishable circumstances, we addressed the relationship between the FSIA and the jurisdictional bar of § 1447(d) in *Mobil Corp. v. Abeille General Insurance Co.*[11] Mobil had sued several insurance companies in a declaratory judgment action in state court. One of those insurance companies, the Insurance Company of Ireland ("ICI"), claimed that it was an instrumentality of a foreign state under the FSIA and removed to federal court.

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[8] 28 U.S.C. § 1447(c) (emphasis added).

[9] 28 U.S.C. § 1447(d).

[10] *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977) (per curiam); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed.2d 542 (1976).

[11] 984 F.2d 664 (5th Cir. 1993).

Presumably because it was engaged in a commercial activity in the United States, ICI made no claim to immunity[12]; ICI nonetheless contended that its status as an instrumentality of a foreign state entitled it to a bench trial in a federal forum under the FSIA and 28 U.S.C. § 1441(d). The district court disagreed, concluding that ICI was not an instrumentality of a foreign state, and consequently remanded to the state court—at least in part—for lack of subject matter jurisdiction.[13]

On appeal, ICI argued that the FSIA fell within an exception to § 1447(d). Specifically, it claimed that the decision on FSIA immunity is typically a substantive one that would terminate the litigation before remand if immunity were granted. ICI also observed that denials of sovereign immunity are subject to interlocutory appeal. ICI thus reasoned that unique FSIA concerns justified reviewing the district court's "substantive" decision denying foreign-state status.[14]

In *Mobil* we flatly rejected ICI's argument. We first stated that Congress enacted § 1447(d) so that state court actions could proceed without delay if the district court remanded for lack of jurisdiction—regardless of the correctness of the district court's jurisdictional decision.[15] We then rejected any attempt to cloak an FSIA jurisdictional call with a substantive mantel, stating that "[a]lthough the existence of removal jurisdiction may depend on substantive

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[12] *See* 28 U.S.C. § 1605(a)(2) (providing that immunity does not apply to certain types of commercial activity).

[13] *Id.* at 665-66.

[14] *Id.* at 666.

[15] *Id.*

matters, the absence of removal jurisdiction is a procedural defect governed by § 1447(c)."[16] We concluded with the recognition that even though an unreviewed remand may—as a practical matter—work a deprivation of immunity, such a risk was implicit in Congress's decision not to create in the FSIA an express exception to non-reviewability.[17]

B. *Attempts to Avoid the § 1447 Jurisdictional Bar*

Against the harsh backdrop of *Mobil* and § 1447 the Airbus Defendants raise a plethora of imaginative theories to encourage our finding of jurisdiction to hear this appeal. Unfortunately for the Airbus Defendants, however, none of these theories "hang together."

1. Separability Doctrine

The Airbus Defendants contend that the district court's ruling on their status under the FSIA is a "separable order" reviewable apart from the decision to remand. They urge that *Mobil* does not control here because—unlike the defendant in *Mobil*—the Airbus Defendants do not seek review of the district court's order of remand; rather, they seek review of the FSIA order itself. Additionally, note the Airbus Defendants, the defendant in *Mobil* did not claim immunity and likely could not have, given the commercial activity exception,[18] whereas the Airbus Defendants vigorously assert their entitlement to immunity—which

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[16] *Id.* (quoting *Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924, 926 (5th Cir. 1992)).

[17] *Id.* The court in *Mobil* also noted that this circuit had refused to create implicit exceptions to § 1447(d) in other contexts. *Id.*

[18] *See* 28 U.S.C. § 1605(a)(2).

typically gives rise to an order that is immediately appealable under the *Cohen* collateral order doctrine. Although the Airbus Defendants make an appealing argument, we must conclude that the FSIA order is not "separable" and hence not reviewable on appeal.

The notion that certain orders may be reviewed on appeal if such orders are "separable" from the order of remand originated with the Supreme Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934). In *City of Waco*, Curtis Boggs filed suit in Texas state court against the city of Waco, Texas, and its contractor, Combs & Glade, for damages Boggs allegedly caused by a street obstruction.[19] The city then brought United States Fidelity Company & Guaranty Company ("Fidelity"), surety on a bond of Combs & Glade, into the suit by way of a "cross-action," alleging that Fidelity "was liable under the bond to pay whatever amount might be adjudged due by the City by reason of the fault [Combs & Glade]."[20] Fidelity removed the case to federal court, and Boggs moved for a variety of relief, including that the entire case be remanded or that the case against Fidelity be dismissed and the remainder of the case remanded.[21]

In a single order, the district court denied Boggs' motion to remand the entire case but granted the motion to dismiss the cross-action, finding that as to Boggs' cause of action "the Fidelity Company was an unnecessary and

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[19] *City of Waco*, 293 U.S. at 141, 55 S.Ct. at 6.

[20] *Id.*

[21] *Id.* at 141-42, 55 S.Ct. at 6-7.

improper party."[22] Because this dismissal eliminated diversity jurisdiction, the court remanded the remainder of the case for lack of subject matter jurisdiction. [23]

The Supreme Court eventually determined that the remand order did not preclude appellate review of the dismissal order, stating:

> True, no appeal lies from the order of remand; in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the [city of Waco].

The Court also explained that although "a reversal cannot affect the order of remand, ... it will at least, if the dismissal of the [city's] complaint was erroneous, remit the entire controversy, with the Fidelity Company as a party, to the state court for such further proceedings as may be in accordance with law." [24]

In determining whether an order is "separable" and thus can be afforded appellate review under *City of Waco*, we have focused on language in the Court's opinion suggesting that an order is "separable" from an order of remand if it precedes that of remand "in logic and in fact" and is "conclusive," i.e., it will have the preclusive effect of

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[22] *Id.* at 142, 55 S.Ct. at 6-7.

[23] *Id.*

[24] *Id.* at 143-44, 55 S.Ct. at 7.

being functionally unreviewable in the state court.[25] Although the district court's FSIA order in the instant case may have preceded the court's order of remand "in logic and in fact," we cannot say that it was "conclusive." In light of the district court's ultimate conclusion that the entire case had to be remanded for lack of subject matter jurisdiction, the district court's determination that the FSIA is inapplicable to the Airbus Defendants can be deemed a jurisdictional finding under the facts of this case and, as such, can be reviewed by the state court upon remand.[26] Under *City of Waco* and the jurisprudence of this circuit, the district court's

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[25] *See, e.g., John G. & Marie Stella Kenedy Memorial Found. v. Mauro*, 21 F.3d 667, 670 (5th Cir. 1994) (determining that the district court's dismissal of § 1983 claims barred by the Eleventh Amendment before its remand of pendent state law claims was reviewable on appeal); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (concluding that the portion of a remand order that resubstituted an individual for the United States as defendant and thus destroyed removal jurisdiction was reviewable on appeal because it was separable from the remand order and final for purposes of appeal); *Adams v. Sidney Schafer & Assocs.,Inc. (In re Adams)*, 809 F.2d 1187, 1189 (5th Cir. 1987) (explicitly observing that unless the district court's "reinstatement" order were reviewed on appeal, it would be "functionally unreviewable" by the state court); *cf. Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 419 (5th Cir. 1991) (explaining that district court's determination that the plaintiff's claims were not within the boundaries of ERISA pre-emption was a "jurisdictional finding" under the facts of the case that could be reviewed by the state court on remand and thus was not "separable").

[26] *Soley*, 923 F.2d at 409-410 (indicating that findings made for the purpose of determining federal jurisdiction have no preclusive effect on the state court); *see Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1347-50 (6th Cir. 1993); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *see also Mobil*, 984 F.2d at 666 (rejecting an attempt to cloak an FSIA jurisdictional call with a substantive mantle).

FSIA order is therefore not "conclusive" upon the Airbus Defendants so as to be "separable" and hence reviewable by this court.

2. Non-Preclusive Nature of FSIA Order

In apparent recognition of our inability to review the FSIA order *simpliciter*, the Airbus Defendants proffer two arguments. First, they suggest that if no other alternative method exists for acquiring jurisdiction, we should exercise our inherent powers to recall our earlier mandate "to prevent injustice." In support of this contention, the Airbus Defendants point out that they have assiduously pursued their claim of immunity, both at trial and on appeal. Yet their appeal in *Airbus I* was dismissed as premature and their second appeal is being treated at "too late." [27] The Airbus Defendants conclude that such a result effectively deprives them of immunity, thereby working an injustice that—given the absence of other options—can only be prevented here by a recall of the mandate. The poignancy of this claim is enhanced by the fact that the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity.[28]

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[27] We observe the Airbus Defendant recognized this problem early-on in their Petition for Panel Rehearing presented to the *Airbus I* panel. Unfortunately, such foresight is of little help here.

[28] As noted in Part I, the resolution of the Airbus Defendants' claim of immunity turns on whether through "tiering" a foreign state's ownership interest can be attributed when that foreign state did not own a majority interest in the company that held the ownership interest in Airbus. The district court answered this question in the negative. *See Linton*, 794 F.Supp. at 653-54. Hence, Germany's interests could not be pooled since Germany failed to own a majority interest in the companies through which Germany held its ownership interest in the Airbus Defendants. The controlling statute, however, erects no explicit bar to

Although the Airbus Defendants are correct in asserting that we have authority to recall our mandate "to present injustice,"[29] we discern no such injustice here. Significantly, the district court's conclusions regarding the FSIA status of the Airbus Defendants were "jurisdictional" under the facts of this case; they thereby have no preclusive effect on the state courts.[30] Thus, the only consequence of

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the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity*—not its parent—have "a majority of [its] shares or other ownership interest ... owned by a foreign state or a political subdivision thereof." 28 U.S.C. § 1603(b)(2). There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

We also observe that the district court questioned whether the interests of two or more foreign states could be combined, commenting that "pooling" appears to be foreclosed by the use of the state ("singular") in the FSIA. *Linton*, 794 F.Supp at 652. This reasoning probably should be examined in light of the rules of statutory construction, e.g., 1 U.S.C. § 1 (providing that "words importing the singular include and apply to several persons, parties, or things" unless the context indicates otherwise), and in light of the cases in which the pooling issue has been considered. *See e.g., LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400, 1405-06 (E.D.Va. 1988) (concluding that pooling was allowed); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F.Supp. 553, 568-69 (C.D.Cal. 1979) (assuming same), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982); *Rios v. Marshall*, 530 F.Supp. 351, 371 (S.D.N.Y. 1981) (assuming same).

[29] *See* 5th Cir.R. 41.2; *see also, e.g., Masinter v. Tenneco Oil Co.*, 934 F.2d 67, 68 (5th Cir. 1991) (stating that a mandate may be recalled only to prevent injustice); *Canal Ins. Co. v. First Gen. Ins. Co.*, 901 F.2d 45, 46-47 (5th Cir. 1990) (recalling mandate to modify it so that the district court could consider awarding interest).

[30] *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 409 (5th Cir. 1991) (concluding that orders construed as "jurisdictional" and that lead to remand under § 1447 do not have preclusive effects on state

not recalling the mandate here is that the Airbus Defendants must have the merits of their FSIA claims determined by a state court rather than by a federal court. As such, there is no "injustice," for our counterparts in the state system are competent to address the Airbus Defendants' claims of immunity under the FSIA.[31] Accordingly, we decline their invitation to recall the mandate of *Airbus I*.

The Airbus Defendants argue in the alternative that the district court's failure to rule is itself an appealable denial of immunity. In support of this claim the Airbus Defendants cite *Helton v. Clements*,[32] in which we held that a failure to rule on a motion for immunity may itself constitute an appealable decision. They point out correctly that *Helton* is premised on the notion that a refusal to rule on a motion for immunity effectively denies that immunity by subjecting the defendants to the burdens of trial—the same expense and exposure that foreign sovereign immunity is designed to prevent.[33] The Airbus Defendants complain that they are indeed suffering here from the very harm that *Helton* envisioned and sought to prevent. They insist that, by "refusing" to rule on their motion to dismiss, the district court has subjected them to a remand and the likelihood of trial in state court.

Although we sympathize with the Airbus Defendants' plight, we do not read *Helton* as applicable to the instant

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courts); *Mobil*, 984 F.2d at 666 (observing that state courts would be able to reconsider the FSIA issues after remand).

[31] *See* 28 U.S.C. §§ 1602, 1603-11 (providing statutory grant of concurrent jurisdiction to state courts to resolve FSIA suits).

[32] 787 F.2d 1016, 1017 (5th Cir. 1986).

[33] *Id.* at 1017.

facts. In *Helton*, the refusal to rule subjected the defendants to the burdens of trial, thereby effectively negating the defendant's immunity. As noted here, however, the refusal to rule—even if it can be properly characterized as such[34]—merely means that the Airbus Defendants' claims to immunity will be considered by the state courts instead of by a federal appellate court. Thus, unlike the defendants in *Helton*, the Airbus Defendants have not been effectively denied their claimed immunity; they simply must have that issue resolved in a different forum—one which undoubtedly consider federal jurisprudence to be instructive, albeit non-binding.

3. Mandamus and § 1447

The Airbus Defendants also contend that 1) the district court remand was based on a "post-removal event"—the citizenship stipulation—2) such remand meant that the case was originally "properly removable," and 3) the remand for this post-removal event was thus not based on a ground enumerated in § 1447(c). Therefore, conclude the

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[34] The district court refused to rule on the motion to dismiss on remand because it concluded that it lacked subject matter jurisdiction. Refusing to rule under these circumstances was proper. *See, e.g., In re Carter*, 618 F.2d 1093, 1098 (5th Cir. 1980). Thus, the only valid complaint left is that the district court refused to rule before the first appeal. But unlike the court in *Helton*—which explicitly refused to rule on the immunity issue—the district court in the instant case did in fact make such a ruling; it merely did so in a form that was presumed to be unappealable owing to that court's failure to rule on the other grounds raised in the motion to dismiss. Because we conclude that the Airbus Defendants's are not precluded from reurging their immunity defense in state court, we need not, and therefore do not, decide whether a ruling on immunity in a form that is deemed unappealable is itself a "refusal to rule" subject to appeal.

Airbus Defendants, this remand is reviewable by mandamus.[35]

We find this argument intriguing yet unpersuasive. Initially, we note that mandamus adds nothing to the authority of this court to review jurisdictional remands under § 1447. When such a remand order is not reviewable by appeal it is not reviewable "otherwise."[36]

Turning to the merits of the Airbus Defendants' contention, we observe that—even if this stipulation can properly be considered a "post-removal" event[37]—we have

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[35] The Airbus Defendants also argue that this stipulation applied to only one of the two cases that had been consolidated here. Hence, the order remanding both cases for lack of subject matter jurisdiction was in error. Such an argument misapprehends the nature of the bar in § 1447: If a district court remands for lack of subject matter jurisdiction, then that remand order may not be reviewed even if it were clearly erroneous. *E.g.*, *Tillman v. CSX Transportation*, 929 F.2d 1023, 1028 (5th Cir. 1991).

[36] *See* 28 U.S.C. § 1447(d); *Gravitt*, 430 U.S. at 723, 97 S.Ct. at 1439 (holding that we cannot use mandamus to review a remand order that would not be reviewable by direct appeal).

[37] The plaintiffs argue that no post-removal event is involved here, as the stipulation merely related to the plaintiffs status at the time of removal. *CF. Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559, 565 (5th Cir. 1993) (concluding that affidavit which merely clarified the amount in controversy at time of removal was not a post-removal event). The Airbus Defendants claim that the stipulation itself is the post-removal event; according to them the stipulation did not relate back to the plaintiffs status at the time of removal because the district court had previously held that the plaintiffs' petition estopped them from contesting that status. *Cf. St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290, 58 S.Ct. 586, 590-91, 82 L.Ed. 845 (1938) (events occurring subsequent to removal generally do not oust a district court of jurisdiction). As we conclude that this stipulation is not reviewable even

twice before concluded that jurisdictional remands premised on post-removal events are not reviewable. In *Tillman v. CSX Transportation*,[38] the district court remanded for lack of subject matter jurisdiction based on a post-removal event—the joinder of a state agency. Despite the fact that this decision was clearly wrong—and that it was based on a post-removal event—we held that it was nonetheless non-reviewable because the remand was granted on § 1447(c) jurisdictional grounds.[39] *Tillman* merely followed our prior precedent, *In re Merrimack Mutual Fire Insurance Co.*,[40] in which we stated that such remands are not reviewable in light of Supreme Court precedent and the statutory policy of avoiding substantial delays caused by appellate review.

Finally, we conclude that the attempt by the Airbus Defendants to distinguish cases such at *Tillman* simply does not work.[41] The Airbus Defendants argue that *Tillman* involved the joinder of a party, one of the grounds expressly enumerated in § 1447(e). Accordingly, insist the Airbus Defendants, as this is a ground enumerated in subsection (e)

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if it were classified as a post-removal event, we need not decide which of the foregoing characterizations is more apt.

[38] 929 F.2d 1023, 1025 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 176, 116 L.Ed.2d 139 (1991).

[39] *Id.* at 1028-29.

[40] 587 F.2d 642, 647-49 (5th Cir. 1978).

[41] The Airbus Defendants also cite recent precedent in the Sixth Circuit and the Seventh Circuit that authorizes review of remands based on post-removal events. *See Baldridge v. Kentucky-Ohio Transp.*, 983 F.2d 1341, 1348-49 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1132 (7th Cir. 1992). Airbus and AeF do not argue, however, that these cases recognize any grounds—such as a favorable statutory change—that would negate the precedential force of *Tillman* and *Merrimack*.

of § 1447, it falls within the bar contained in subsection (d) of that same section. The instant case is thus different, they urge, because it involves a remand based on a non-enumerated ground—the loss of diversity jurisdiction caused by a change in citizenship status.

But our cases, such as *Tillman*, are not based on any purported "enumerated-non-enumerated" distinction between the various grounds for the lack of jurisdiction. Rather, these cases are premised on the concept that when the district court declares that it is remanding for lack of subject matter jurisdiction, its remand order may not be reviewed on appeal, no matter how erroneous. The "operative fact" is the ultimate one—the districts court's conclusion that it no longer has jurisdiction. Efforts to dissect the reasoning of that conclusion so as to find appellate jurisdiction are little more than veiled attempts to investigate indirectly the correctness of the district court's conclusion. Our concluding statement in *Tillman* regarding the non-reviewability of such error is instructive:

> Consequently, having been erroneously remanded on § 1447(c) jurisdictional grounds, this case is irretrievably beyond anything we can do about it. We cannot review it by any means. We emphasize our complete inability to do anything about the trial court's joinder order, whether interlocutory or final, because what we cannot review we cannot by some juridical self-help get back to federal court.[42]

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[42] *Tillman*, 929 F.2d at 1029.

III

CONCLUSION

> I call them the Wards in Jarndyce. They are caged up with all the others. With Hope, Joy, Youth, Peace, Rest, Life, Dust, Ashes, Waste, Want, Ruin, Despair, Madness, Death, Cunning, Folly, Words, Wigs, Rags, Sheepskin, Plunder, Precedent, Jargon, Gammon, and Spinach![43]

Like the poor Wards in Jarndyce, the Airbus Defendants have searched in vain for resolution of their claim. We take comfort, though, in the fact that, unlike the Wards in Jarndyce—who were forever consigned to wander about in the fog of Chancery court—the Airbus Defendants will be able to have the merits of their claim of FSIA immunity heard, albeit in state court. We are confident that there the FSIA immunity claim and its central issues of pooling and tiering will receive the full, objective and learned consideration to which they are clearly entitled.

As we conclude that, under the peculiar circumstances of this matter, the district court's remand for lack of subject matter jurisdiction deprives us of jurisdiction to review the instant case, the motions of the Airbus Defendants that we recall the mandate in Number 92-7564 and that we issue a writ of mandamus are denied; and the motion of appellees that this appeal be dismissed is granted.

DISMISSED.

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[43] CHARLES DICKENS, BLEAK HOUSE, ch. 60 (1853).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL., Plaintiffs;	§	
VS.	§	CIVIL ACTION NO. G-92-102
AIRBUS INDUSTRIE, ET AL., Defendants;	§	CONSOLIDATED WITH
MR. & MRS. STAN MOSS, ET AL., Plaintiffs;	§	
VS.	§	CIVIL ACTION NO. G-92-103
AIRBUS INDUSTRIE, ET AL., Defendants.	§	

ORDER

Before the Court is the Motion to Dismiss of Defendants Airbus Industrie and Aeroformation. [1] In their first responsive pleading filed in this Court, Defendants moved to dismiss all claims against them for, inter alia, lack of personal jurisdiction and forum non conveniens. The Court considers each of these contentions in turn.

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[1] Hereinafter referred to collectively as "Defendants."

I. PERSONAL JURISDICTION

A federal court may not consider a forum non conveniens motion if it lacks jurisdiction over the parties. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947); Allstate Life Ins. Co. v. Linter Group Ltd., 782 F.Supp. 215, 219 (S.D. N.Y. 1992). If personal jurisdiction is challenged, the burden is on the plaintiff to prove the existence of jurisdiction by a preponderance of the evidence. Linter, 782 F. Supp. at 219-220. Initially, however, the plaintiff is only required to make a prima facie showing that jurisdiction exists. See, e.g., id., Villar v. Crowley Maritime Corp., 780 F.Supp. 1467, 1481 (S.D. Tex. 1992), aff'd, Nos. 92-7162, 93-7036, slip op. 4369, 4379 (5th Cir. May 25, 1993). In the instant case, Plaintiffs have failed to respond to Defendants' motion. As the other evidence in the record fails to establish prima facie evidence of this Court's ability to exercise personal jurisdiction over Defendants, the Court must conclude that it lacks personal jurisdiction over them.

II. FORUM NON CONVENIENS.

If this Court could exercise jurisdiction over Defendants, the Court would dismiss this action for forum non conveniens.

A. Choice of Law

Plaintiffs recognize that "the Fifth Circuit has previously held that the Federal law of forum non conveniens applies in a diversity case," but then go on to argue that this

Court should apply Texas forum non conveniens law, [2] rather than federal law, in this case. However, in In re Air Crash Disaster,[3] the Fifth Circuit, in a carefully considered opinion, expressly held that federal courts must apply federal forum non conveniens law. Id. at 1156-59. The Fifth Circuit has repeatedly affirmed this conclusion. See, e.g., Villar v. Crowley Maritime Corp., Nos. 92-7162, 93-7036, slip op. 4369, 4379 (5th Cir. May 25, 1993); Nolan v. Boeing Co., 919 F.2d 1058, 1068 n.11 (5th Cir. 1990), cert. denied, 111 S.Ct. 1587 (1991). Thus, Plaintiffs' argument to the contrary is patently frivolous and exceeds the bounds of zealous advocacy. Villar, slip op. at 4381. The only forum non conveniens issue before the Court is whether dismissal is appropriate under federal law.

2. Application of Federal Forum Non Conveniens Law.

Before dismissing a case for forum non conveniens, a court must first determine whether an adequate foreign forum exists. In re Air Crash Disaster, supra, 821 F.2d at 1165. A forum is adequate if all the parties are subject to jurisdiction there, the entire case can be heard there, and all the parties will be treated fairly. Id.

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[2] In Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 677-79 (Tex. 1990), cert. denied, 498 U.S. 1024 (1991), the Texas Supreme Court held that, under Texas law, a district court may not dismiss a wrongful death or personal injury action for forum non conveniens. Recently, this decision was legislatively overruled. See 61 U.S.L.W. 2580 (March 30, 1993).

[3] 821 F.2d 1147 (5th Cir. 1987) (en banc), vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989).

Several federal courts have found that both India and France are adequate forums for resolving claims similar to those asserted in the instant case. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (France); Chhawchharia v. Boeing Co., 657 F. Supp. 1157, 1159-60 (S.D. N.Y. 1987) (India); In re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp. 842, 845-52 (S.D. N.Y. 1986) (India), aff'd as modified, 809 F.2d 195 (2d Cir.), cert. denied sub nom. Executive Comm. Members v. Union of India, 484 U.S. 871 (1987). The Court has considered these decisions and other similar ones and is in agreement with their conclusions.

Additionally, in the instant case, Defendants have agreed to submit to the jurisdiction of the Courts of either India or France, to waive all limitations defenses, and to condition dismissal from this Court to allow for reinstate if the foreign courts decline to exercise jurisdiction. Under these circumstances, both India and France are adequate foreign forums.

Plaintiffs' only argument to the contrary is that, because neither India or France permits contingent fee arrangements, a forum non conveniens dismissal will effectively end this litigation. While this may be true, it is not a persuasive argument. To say that Plaintiffs will not, for economic reasons, pursue their claims in French or Indian courts is not to say that those courts would not afford them a remedy. Plaintiffs' preference for an American forum does not render either France or India inadequate.

Once it is determined that an adequate foreign forum exists, a court must balance the public and private interest factors outlined by the Supreme Court in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). The private interest factors include:

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 508.

The relevant public factors include

> the administrative difficulties caused by crowded dockets, the burden of imposing jury duty on citizens of a forum with no relation to the dispute, the local interest in having localized controversies decided in that locality, and the appropriateness of deciding diversity cases in the forum whose law provides the substantive rules of decision.

Villar v. Crowley Maritime Corp., supra, 780 F. Supp. at 1484-85 (citing id. at 508-09).

In the instant case, after carefully examining the record, the Court is convinced that, assuming it has jurisdiction and that venue was properly laid, a forum non conveniens dismissal is appropriate. As to the private factors, many of the Plaintiffs are not United States citizens[4] and none of the few that are are residents of Texas. Moreover, this accident occurred in India. Should a view of the crash site be necessary, India would be a much more convenient forum and France would be at least as

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[4] However, several are citizens of India.

convenient. Also, many of the witnesses with knowledge of Defendants' manufacturing and design procedures are located in France. Similarly, many of the witnesses with knowledge of the crash and of related activities subsequently undertaken are in India. Likewise, there is no evidence that the cost of obtaining witnesses will be any greater in France or India than it would be in Texas.[5] Thus, on balance, the Court believes that the private interest factors favor dismissal.

Similarly, the public interest factors also favor dismissal. This action is probably governed by foreign law.[6] The courts of India and France are in a better position to apply their own law and in at least as good a position to apply each other's law as is this Court. Moreover both France, because of its relationship with Defendants, and India, because of the situs of the crash, have an interest in deciding this case. Texas has none, beyond a general commitment, now legislatively abolished and never, in any case, recognized by the federal courts, to serving as the world's courthouse. Thus, retention of this case in this Court would be an extreme imposition to Texas jurors, Texas court personnel, and other litigants with cases pending before this Court.

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[5] Presumably it would be less since this case has no relationship whatsoever to Texas and very little to the United States.

[6] Under Texas choice-of-law rules, the law of the forum with the most significant relationship to the controversy applies. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984). Texas has no significant relationship to this controversy, and there is no evidence that any state has a more significant relationship than either India or France. Thus, if this case were heard in this Court, Indian or French law would most likely control.

3. Dismissal vs. Remand.

Finally, Plaintiffs argue that the Court should remand this action to state court rather than dismiss it for forum non conveniens. Even assuming that the Court has the discretion to remand this case rather than to dismiss it for forum non conveniens, it is not required to do so. See Nolan v. Boeing Co., supra, 919 F.2d at 1069-70. This case has no connection with Texas, thus a Texas state court would be no more convenient than this Court. Likewise, Plaintiffs have an adequate, alternative forum, thus remand would serve no purpose other than to allow Plaintiffs to maintain a contingent fee arrangement with their attorneys. Thus, in the normal course of events, the Court would dismiss this case for lack of personal jurisdiction and, in the alternative for forum non conveniens; it would not remand it back to state court.

III. SUBJECT MATTER JURISDICTION.

There is, however, a fly in this ointment. In their Motion to Remand, Plaintiffs asserted that complete diversity was lacking because Andrew and Sarah Howell (the "Howells"), the parents of Plaintiff Laura Howell Linton, were stateless citizens of the United States. As the Personal Representative of the Howells' estates, Plaintiff Linton, in her representative capacity, was also stateless for jurisdictional purposes.[7] Because the presence of a stateless citizen of the United States on either or both sides of a controversy destroys diversity, remand was proper.

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[7] 28 U.S.C. § 1332(c)(2) provides that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ."

After noting that the initial removal was proper because, according to both the original state-court petition and the state-court pleadings on file at the time of removal, Plaintiff Linton was a resident of Maryland in both her individual and representative capacities,[8] the Court held that Plaintiffs were estopped from controverting these jurisdictional facts because the facts relating to the Howells' domicile were, or should have been, within the knowledge of Plaintiffs at the time suit was filed. Thus, in the Court's view, Plaintiffs' allegation that the Howells' only domicile was in Korea was suspect, especially given that Plaintiffs offered no reason for their failure to so allege prior to removal.

Subsequently, however, the Linton Plaintiffs entered into several stipulations with Defendants. In particular, these parties stipulated that

1. the Howells lived and worked in Korea from 1985 until their deaths;

2. the Howells maintained their sole place of residence in Korea; and

3. the Howells did not have a permanent residence in the United States.[9]

In other words, it now appears that Defendants have admitted what the Court previously held Plaintiffs were estopped from

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[8] See, e.g., 14A Charles A. Wright et al., Federal Practice & Procedure § 3723, at 312 (2d ed. 1985) (removal based on diversity proper if complete diversity exists at the time of filing and at the time of removal) [hereinafter Wright & Miller].

[9] See Exhibit B, Def.s' Supp. Mot. Dismiss.

asserting, viz. that the Howells were stateless citizens of the United States.[10] If the parties are willing to stipulate to these facts, the Court does not feel compelled to ignore them in considering the question of its subject matter jurisdiction.

As noted above, this case was properly removed given the allegations in the initial pleadings and those on file at the time of removal. Normally, once a case is properly removed, the subsequent actions of the plaintiff will not divest the court of jurisdiction. However, a post-removal event that goes to the essence of subject matter jurisdiction may require remand. See, e.g., 14A Wright & Miller § 3723, at 324.

In the instant case, Plaintiffs, following removal, sought leave to amend their Complaint to assert that the Howells were stateless United States citizens. In the Court's view, the stipulations discussed above, in the absence of any evidence to the contrary, establishes the truth of these allegations. The presence of even one stateless United States citizen as a party destroys diversity.[11] Therefore, based on

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[10] For jurisdictional purposes, a United States citizen is a citizen of a state if he is domiciled within that state. Other than Plaintiffs' pleadings filed prior to removal, the record is barren of evidence that the Howells were domiciled in any state. The stipulations entered into by the parties indicate that their only legal domicile was in Korea. While it is true that residence is not, in all cases, the same as domicile, the fact that they resided in Korea coupled with the complete lack of evidence of a legal domicile in any state compels the conclusion that the Howell's were stateless.

[11] [F]or diversity purposes a United states citizen normally is considered to be a citizen of the state in which he has a legal domicile. Accordingly, it has been held consistently that a diversity suit may not be maintained under Section 1332(a)(1) by or against a United States citizen who is domiciled in a foreign country. Moreover, an American living abroad is not by virtue

the admissions of the parties, the Court must conclude that it lacks subject matter jurisdiction.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that that portion the Court's Order of May 3, 1993 denying Plaintiffs' Motion for Leave to Amend is hereby VACATED.

It is further ORDERED that Plaintiffs' Motion for Leave to Amend is GRANTED and Plaintiffs' previously offered Amended Complaint is hereby accepted and made a part of the record for all purposes.

It is further ORDERED that that portion of the Court's Order of May 3, 1993 denying Plaintiffs' Motion to Remand on the ground that Plaintiffs' were estopped from asserting that Plaintiff Linton is, in her representative capacity, a stateless United States citizen is VACATED.

It is further ORDERED that Plaintiffs' Motion to Remand is GRANTED FOR LACK OF SUBJECT MATTER JURISDICTION on the ground that complete diversity does not exist between the parties because Plaintiff Linton is, in her representative capacity, a stateless United States citizen.

It is further ORDERED that this action is REMANDED to the state court from whence it came.

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of that domicile a citizen or subject of the foreign state in which he resides so as to permit invocation of the alienage jurisdiction prescribed in Section 1332(a)(2) of the Judicial Code. 13B Wright & Miller, § 3621, at 577-79 (footnotes omitted).

It is further ORDERED that THE PARTIES FILE NO FURTHER PLEADINGS IN THIS COURT.[12]

IT IS SO ORDERED.

DONE at Galveston, Texas this 24th day of June, 1993.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

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[12] As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ("FSIA"). If that judgment is reversed on appeal, then the instant Order is a nullity. Assuming Defendants are foreign sovereigns, the Court would dismiss the action for lack of subject matter jurisdiction under the FSIA and lack of personal jurisdiction. Alternatively, the Court would, as outlined above, dismiss this action for forum non conveniens.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL.,	§	
Plaintiffs;	§	
VS.	§	CIVIL ACTION
	§	NO. G-92-102
AIRBUS INDUSTRIE, ET AL.,	§	
Defendants;	§	
	§	
	§	CONSOLIDATED
	§	WITH
MR. & MRS. STAN MOSS	§	
ET AL.,	§	
Plaintiffs;	§	
VS.	§	CIVIL ACTION
	§	NO. G-92-103
AIRBUS INDUSTRIE, ET AL.,	§	
Defendants.	§	

ORDER

Recently, the Court entered an Order of Remand in the aboved-captioned actions. In that Order, the Court stated that Plaintiffs had failed to respond to outstanding motions to dismiss for lack of personal jurisdiction. Due to an oversight, the Court was unaware that the relevant parties had stipulated to the Court's personal jurisdiction.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that that portion of the Court's Order of Remand addressing this Court's personal jurisdiction is VACATED FOR ALL PURPOSES.

It is further ORDERED that, to the extent that this Court presently lacks jurisdiction to enter such an Order, this Order shall

serve as notice to the court or courts with jurisdiction of the previous oversight.

It is further ORDERED that, to the extent this Court lacks jurisdiction, this Order will be effective immediately should this Court ever regain jurisdiction.

IT IS SO ORDERED.

DONE at Galveston, Texas this 8th day of July, 1993.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL., Plaintiffs;	§	
VS.	§	CIVIL ACTION NO. G-92-102
AIRBUS INDUSTRIE, ET AL., Defendants;	§	
	§	CONSOLIDATED WITH
MR. & MRS. STAN MOSS, ET AL., Plaintiffs;	§	CIVIL ACTION NO. G-92-103
VS.	§	
AIRBUS INDUSTRIE, ET AL., Defendants.	§	

ORDER

Before the Court is Plaintiffs' Motion to Remand and Motion for Leave to file Amended Complaint.[1] For the reasons stated below, the Court is of the opinion that both motions should be DENIED.

The action arises out of an air crash that occurred on or about February 14, 1990, in Bangalore, India. Plaintiffs

[1] **Plaintiffs' proposed Amended Complaint asserts that Plaintiff Linton in her representative capacity is a stateless United States citizen rather than a citizen of Maryland. See Part I(C), infra.**

initiated this action in Texas state court. Defendants subsequently removed to this Court. Defendants assert that 1) pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA"), Defendant Airbus Industrie ("AI") and Defendant Aeroformation ("AeF") are each an agency or instrumentality of a foreign state; and 2) complete diversity exists between the parties. Therefore, Defendants contend, this action was properly removed pursuant to both 28 U.S.C. § 1441(d)[2] and 28 U.S.C. § 1441(a).[3]

The Court has previously held that, under the FSIA, neither AI nor AeF is an agency or an instrumentality of a foreign state. Linton v. Airbus Industrie, 794 F. Supp. 650 (S.D. Tex. 1992). The Court now considers whether this action was properly removed pursuant to 28 U.S.C. §§ 1332 and 1441(a). Plaintiffs assert three arguments in favor of remand. The Court considers each in turn.

First, Plaintiffs assert that Defendants failed to timely assert diversity as a ground for removal. This argument is specious.

On March 13, 1992, AI and AeF filed a Notice of Removal, which asserted only the FSIA and 28 U.S.C. §

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[2] Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. . . .

[3] Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

1441(d) as a basis for federal jurisdiction. Thereafter, on the same day, the other Defendants that had been served (except those allegedly fraudulently joined) filed a Notice of Removal asserting diversity as a jurisdictional basis. Plaintiffs argue that this second removal was a nullity because "the state court was already divested of jurisdiction by virtue of the first removal." Pl.s' Mot. Rem. at 12.

This argument is without merit. The removal of a case from state court is accomplished by unilateral acts (the filing of a Notice of Removal etc.) of the removing parties. No action by the state court is necessary, and, indeed, the state court's jurisdiction, or lack thereof, is irrelevant. *Cf.* 28 U.S.C. § 1441(e). Thus, while it is true that the removal of a case divests the state court of jurisdiction to conduct further proceedings,[4] it does not follow that multiple removals are therefore not allowed. See Albonetti v. GAF Corp.-Chem. Group, 520 F. Supp. 825, 828 (S.D. Tex. 1981) (holding that requirement that all defendants join in removal is satisfied if, following filing of notice of removal by one defendant, other defendants either timely join in first removal or file their own notices of removal).[5]

Moreover, even assuming that multiple removals are not allowed, Defendants amended their Notice of Removal to assert diversity as a basis for jurisdiction. A case may be removed within thirty days of the date the first defendant receives notice of the action. 28 U.S.C. § 1446(a).

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[4] See, e.g., 14A Charles A. Wright, et al., Federal Practice & Procedure § 3737, at 549-53 (2d ed. 1985) (footnotes omitted).

[5] Moreover, hypertechnical constructions of the removal statute are disfavored in this circuit, and thus, even assuming that multiple removals were not allowed, the Court would look to the substance of the second Notice of Removal, rather than the title, and treat it as an amendment to the original notice.

Thereafter, the removal petition may be amended any time within this thirty-day period. Richardson v. United Steelworkers, 864 F.2d 1162 (1989), cert. denied, 495 U.S. 946 (1990).

In the instant case, it is undisputed that the first defendant to receive notice sufficient to start the running of section 1446(b)'s thirty-day period received such notice on February 14, 1992. Thus, the thirty-day period began to run on February 15, 1992 and expired on March 15, 1992. Fed. R. Civ. P. 6(a). Because March 15 was a Sunday, however, Defendants had until the end of March 16, 1992 to amend their removal petition. Thus, Defendants' Amended Notice of Removal, which was filed on March 16, was timely.

B.

Next, Plaintiffs assert that diversity removal was improper because Plaintiffs Mr. & Mrs. Stan Moss, in their representative capacities, Defendant Airbus Services Company, Inc. ("ASC") and Defendant Honeywell Space Systems Support Group ("HSSSG") are all citizens of Florida. Defendants argue that HSSSG is not a legal entity and is therefore not capable of joinder as a party defendant and that ASC was fraudulently joined.

1. HSSSG

Defendants have presented uncontroverted evidence that HSSSG is an unincorporated division of Defendant Honeywell, Inc. and is not a separate entity. Therefore, the attempted joinder of HSSSG as a party defendant is not a bar to removal.

2. ASC

Defendants admit that ASC is a citizen of Florida but argue that it was fraudulently joined. In general, the fraudulent joinder of a nondiverse party will not defeat removal. However, to sustain removal, the removing party must demonstrate "that there is 'absolutely no possibility' that the nondiverse defendant will be liable to plaintiff in state court." Robinson v. National Cash Register Co., 808 F.2d 1119, 1123 (5th Cir. 1987) (quoting Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984)).

In the instant case, construing Plaintiffs' Complaint in the light most favorable to them, Plaintiffs assert that removal was improper because ASC is an "alter ego" of either AI or AeF.[6] Because a corporation is deemed to be a citizen of the state, or states, in which its "alter ego" is incorporated, AI or AeF, whichever is the parent corporation, is a citizen of Florida, and, consequently, complete diversity is lacking.

Apparently, however, Plaintiffs misapprehend the nature and scope of the "alter ego" doctrine. In general, the corporate form insulates the owners, directors, and officers of a corporation from individual liability for acts committed by the corporation. Under certain circumstances, however,

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[6] Plaintiffs' Complaint alleges that AI, AeF, ASC, and Defendant Airbus Industrie of North America are all "sham corporate structures, failed to follow corporate formalities and as such, the act of one is the act of the other and their corporate identities should be disregarded. Such an allegation is silly: corporations cannot be the "alter egos" of one another. Elsewhere, Plaintiffs allege that ASC was controlled by AeF and allege other allegations against AI. Therefore, the Court will treat Plaintiffs' "alter ego" allegations as allegations that ASC is the "alter ego" of AI or AeF.

courts will disregard the corporate fiction and hold some or all of the owners, directors, etc. liable for actions ostensibly undertaken on behalf of the corporation. The "alter ego" doctrine allows a court to disregard the corporate fiction because the degree of unity between the corporation and its owners is such that the corporation has ceased to be a separate entity and holding only the corporation liable would result in injustice. See, e.g., Castleberry v. Branscum, 721 S.W.2d 270, 271-72 (Tex. 1986). For jurisdictional purposes, the "alter ego's" owners, directors, and the like are treated as citizens of the state, or states, of which the "alter ego" is a citizen. Panalpina Welttransport GMBH v. Geosource, Inc., 764 F.2d 352, 353 (5th Cir. 1985).

The "alter ego" doctrine does not, however, allow a plaintiff to seek recovery from an alleged "alter ego" for acts taken on behalf of an owner, director, etc. of the "alter ego." Thus, even assuming that ASC is an "alter ego" of AI or AeF or both, this fact is not significant unless Plaintiffs seek to hold AI or AeF liable for an act committed by ASC. In other words, for jurisdictional purposes, regardless of the relationship between AI, AeF, and ASC, neither AI nor AeF will be treated as a citizen of Florida unless Plaintiffs seek to hold either or both liable for an act of ASC.

In the instant case, Plaintiffs have not alleged that either AI or AeF is so liable. Rather, Plaintiffs make general, conclusory assertions of liability against AI, AeF, ASC, and Defendant Airbus Industrie of North America sounding in negligence and strict liability and a general assertion that some sort of "alter ego" relationship exists between these Defendants. By contrast, Defendants have presented uncontroverted evidence that ASC did not 1) design, specify, manufacture, fabricate, assemble, market, promote, distribute, test, supply, sell, or otherwise place into the stream of commerce the aircraft involved in the accident

underlying this litigation or any of its component parts; 2) train or certify any of the pilots involved in that accident; or 3) make any written or oral warranties regarding the aircraft or the pilots. While Plaintiffs' allegations might, in the first instance, be sufficient to withstand a motion to dismiss for failure to state a claim,[7] Defendants' uncontroverted evidence establishes that there is absolutely no possibility that Plaintiffs will recover from ASC in state court. The fact that ASC may be the "alter ego" of AI or AeF is irrelevant to this determination: the "alter ego" doctrine simply does not apply in this case.

Third, Plaintiffs assert that complete diversity does not exist because Andrew and Sarah Howell (the Howells"), the parents of Plaintiff Laura Howell Linton, were stateless citizens of the United States. As the Personal Representative of the Howells' estates, Plaintiff Linton, in her representative capacity, is also stateless for jurisdictional purposes.[8] Because the presence of a stateless citizen of the United States on either or both sides of a controversy destroys diversity, complete diversity does not exist in this case.

Plaintiffs are correct that the presence of even one stateless United States citizen as a party destroys diversity.

> [F]or diversity purposes a United States citizen normally is considered to be a citizen of the state in which he has a legal domicile. Accordingly, it has been held consistently that a diversity suit may not be

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[7] However, it must be remembered that "Texas courts are loathe to merge the separate legal identities of a parent and subsidiary . . . ." Miles v. American Tel. & Tel. Co., 703 F.2d 193, 195 (5th Cir. 1983).

[8] 28 U.S.C. § 1332(c)(2) provides that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ."

> maintained under Section 1332(a)(1) by or against a United States citizen who is domiciled in a foreign country. Moreover, an American living abroad is not by virtue of that domicile a citizen or subject of the foreign state in which he resides so as to permit invocation of the alienage jurisdiction prescribed in Section 1332(a)(2) of the Judicial Code.

13B Wright & Miller, supra, § 3621, at 577-79 (footnotes omitted).

However, according to both the original state-court petition and the state-court pleadings on file at the time of removal, Plaintiff Linton was a resident of Maryland. Thus, diversity removal was proper. Id. § 3723, at 312 (removal based on diversity proper if complete diversity exists at the time of filing and at the time of removal). The general rule is that once a case is properly removed, the subsequent actions of the plaintiff will not divest the federal court of jurisdiction. In the instant case, the Court does not believe that Plaintiffs' attempt to reallege the relevant jurisdictional facts requires remand.

The facts relating to the Howells' domicile were, or should have been, within the knowledge of Plaintiffs at the time this suit was filed. Thus, in the Court's view, Plaintiffs' new allegation that the Howells' domicile was in Korea is suspect, especially given that Plaintiffs offer no reason for their failure to so allege prior to removal.

The Court recognizes that a post-removal event that goes to the essence of subject matter jurisdiction, such as the addition of an indispensable, nondiverse party, may require remand. Id. at 324. Such is not the case here, however. At all relevant times, Plaintiffs knew, or should have known, of the relevant jurisdictional facts. Defendants were entitled to

rely on Plaintiffs allegations, and Plaintiffs will not, following a proper removal, be heard to allege different jurisdictional facts regarding themselves that would, if accepted, defeat diversity.

D.

Finally, Plaintiffs argue that, even if complete diversity exists, removal was barred by 28 U.S.C. § 1441(b) because Defendant FlightSafety Texas, Inc., ("FST") is a citizen of Texas.[9] Defendants do not dispute this contention but assert that FST was fraudulently joined. Plaintiffs assert that FST was properly joined because FST is an "alter ego" of Defendant FlightSafety International, Inc. ("FST").[10] Defendants, however, have submitted unrebutted evidence that FST did not exist as of the date of the accident underlying this suit, and there is no allegation or evidence that FST was created (subsequent to the accident) merely to shield FSI from liability. Thus, despite Plaintiffs' allegations of negligence against FST, the Court can say that there is no way Plaintiffs will be able to recover from FST in state court. Therefore, FST was fraudulently joined, and removal was not barred by 28 U.S.C. § 1441(b).

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[9] Under section 1441(b), a diversity case is removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action if brought."

[10] Although Plaintiffs' allege negligence against both FSI and FST, it is not alleged that FSI is liable to Plaintiffs because of a tort committed by FST. Therefore, the "alter ego" doctrine has no application.

II.

Therefore, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Leave to File Amended Complaint is DENIED.

It is further ORDERED that Plaintiffs' Motion to Remand is DENIED.

It is further ORDERED that the parties file no further pleadings on this issue in this Court. In particular, the Court will not consider any motions for reconsideration or the like.

It is further ORDERED that, consistent with the Court's prior Order, Plaintiffs' have ten days from the date of this Order to respond to all outstanding dispositive motions (e.g., motions to dismiss and motions for summary judgment). The Court will grant no extensions of time for the filing of such responses.

IT IS SO ORDERED.

DONE at Galveston, Texas this 30th day of April, 1993.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL.,	§	
Plaintiffs;	§	
VS.	§	CIVIL ACTION
	§	No. G-92-102
AIRBUS INDUSTRIE, ET AL.,	§	
Defendants;	§	
	§	CONSOLIDATED
MR. & MRS. STAN MOSS, ET AL.,	§	WITH
Plaintiffs;	§	
VS.	§	CIVIL ACTION
AIRBUS INDUSTRIE, ET AL.,	§	No. G-92-103
Defendants.	§	

ORDER

This action arises out of an aircrash that occurred on or about February 14, 1990, in Bangalore, India. Plaintiffs initiated this action in Texas state court. Defendants subsequently removed to this Court, and, thereafter, Plaintiffs moved to remand.

Defendants Airbus Industrie ("AI"), Aeroformation ("AeF"), Airbus Industrie of North America, Inc., and Airbus Service Company, Inc.,[1] argue that removal was proper under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, because AI and AeF are "foreign states" within the meaning of FSIA. For the reasons stated below, the Court does not agree.

I.

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[1] Hereinafter referred to collectively as the "Airbus Defendants."

28 U.S.C. § 1441(d) provides that

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending....

Thus, this action was properly removed if AI or AeF or both is a foreign state with the meaning of FSIA.

The Airbus Defendants argue that AI and AeF are foreign states for purposes of FSIA because each is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603. Section 1603 provides, in part,

> (a) A "foreign state" ... includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state ....
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

II.

This Order considers only whether the second requirement

of section 1603(b) is satisfied. The Airbus Defendants contend that "a majority of the shares or other ownership interest" of both AI and AeF are owned by "a foreign state or a political subdivision thereof." However, it is undisputed that no single foreign state has more than a 50% ownership interest in AI. The Airbus Defendants argue, however, that where an entity is owned by several entities which are themselves at least partially owned by foreign states, the various foreign government ownership interests may be pooled together for purposes of determining whether a majority of the shares or other ownership interest is owned by a foreign state.

Defendants correctly point out that every court that has considered the issue has approved this type of pooling.[2] For example, in *LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400 (E.D.Va. 1988) the court held that FSIA applied to a suit against a foreign airline that was owned by four Persian Gulf states, notwithstanding that no single state owned more than 50% of the airline. Similarly, in *Rios v. Marshall*, 530 F.Supp. 351 (S.D.N.Y. 1981), the court held that British West Indies Central Labour Organization, an unincorporated association serving as the administrative arm of the Caribbean Regional Labour Board, was an instrumentality of its members for purposes of section 1603(b)(2). Also, in *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F.Supp. 553 (C.D.Cal 1979) ("OPEC"), the court apparently assumed, without explicitly holding, that OPEC is covered by FSIA.

The instant case, however, differs from these cases in one important respect. In *LeDonne*, *Rios*, and *OPEC* each owner which was allowed to pool its interest for purposes of satisfying section 1603(b)(2)'s 50% requirement was itself a foreign state as defined by FSIA. Had an individual owner been sued or had any of the individual owners owned more than 50% of the entity that was sued, FSIA would have unquestionably applied.

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[2] Neither the Fifth Circuit nor the Supreme Court has considered the issue.

Not so in the instant case. AI is owned by four corporations. Two of these corporations, which, according to Defendants' calculations,[3] own 42.1% of AI, are controlled by foreign states. Another owner, which controls 20% of AI, is privately owned. The remaining 37.9% is owned by Deutsche Airbus GmbH ("DA"). Thus, assuming that pooling is allowed, the critical question is whether this interest can be pooled with the 42.1% owned by foreign states. If so then FSIA applies; otherwise it does not.

DA is owned by two companies. 20% is owned by Kreditanstalt fur Wiederaufbau ("KfW"), an agency of the German government. The remaining 80% is owned by Messerschmitt-Bolkow-Blohm ("MBB"), a German corporation. Only 36.56% of MBB's shares are owned by foreign states. The other 63.44% privately owned. Thus, only 49.25% of DA's shares are owned by foreign states.

The Airbus Defendants argue that this is irrelevant. To determine whether more than 50% of the shares or other ownership interest of an entity is owned by a foreign state or states, the Court need only consider the total amount owned by foreign states, and need not consider whether the entities contributing ownership interests to be pooled together are themselves foreign states. In the Airbus Defendants' view, since 60.04% of AI's shares are owned by foreign states, it is a foreign state, even though more than 10.04% this ownership interest is asserted through companies a majority of whose shares are held by private owners. Similarly, since 90% of AeF is owned by AI, AeF is also a foreign state.

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[3] Plaintiffs dispute the accuracy and admissibility of several of the Airbus Defendants' calculations. Because the Court has determined that FSIA does not apply even if these calculations are correct, the Court accepts the Airbus Defendants' calculations for purposes of this Order only. The Court does not reach any of Plaintiffs' objections, however, and the use of the Airbus Defendants' calculations for purposes of this Order does not imply any final acceptance.

In the Court's view, the Airbus Defendants' position is difficult to reconcile with either the plain language or the structure and purpose of FSIA. First, it is far from clear that pooling is allowed under FSIA. To approve pooling, the Court must assume that FSIA applies to entities 50% or more of whose shares are owned by foreign states, even though no single foreign state owns more that 50%. Section 1603, however, speaks only of entities 50% or more of whose shares are owned by a foreign state, singular. Arguably, had Congress wished to permit pooling, it could have easily defined a foreign state as an entity 50% or more of whose shares are owned by a foreign state or states. Because Congress did not so define foreign state, it is not for the courts to substitute this definition for the one provided.

Moreover, even assuming that pooling is permitted, it is one thing to say that where an entity is owned by several other entities, FSIA applies to the first entity if more than 50% of its shares are owned by entities which are themselves foreign states. It is quite another thing to say that entities which are not foreign states or their instrumentalities may nevertheless pool their ownership interests in another entity such that FSIA applies to the latter.

Obviously FSIA applies to foreign states. Likewise, under section 1603, an entity 50% or more of whose shares are owned by a foreign state is itself a foreign state. In the Court's view, although reasonable minds could disagree, it does not do too much violence to either the plain language or the spirit of FSIA to hold that foreign states may pool their interests in an entity for purposes of determining whether that entity is a foreign state under FSIA. FSIA would unquestionably apply if any owner were a party or if more than 50% of the entity in question were owned by any single foreign state. It is not, therefore, too much of a stretch to assume that Congress intended FSIA to apply to an entity owned by several foreign states, even if no single foreign states owns a majority; a majority of the entity's stock or other ownership interest is still owned by foreign states to which Congress clearly intended FSIA to apply.

Just as clearly, however, FSIA does not apply to entities that are not foreign states, nor does it apply to entities owned by entities which are not foreign states. In the Airbus Defendants' view, however, FSIA may apply to an entity, even if a majority of the shares of that entity are owned by an entity which is not a foreign state. For example, if 48% of the shares of "Entity A" are owned by a foreign state, and "Entity B" is wholly owned by "Entity A," FSIA does not apply to either. Under the Airbus Defendant's approach, however, if "Entity A" sells 5% of the shares of "Entity B" to another entity which is entirely owned by a foreign state, FSIA will apply to "Entity B," *even though 95% of the shares of "Entity B" are owned by an entity which is not a foreign state and which is explicitly excluded from the protections of FSIA*. That more than 50% of the total ownership of "Entity B" is controlled by one foreign state or another does not negate the fact less than 5% of Entity B's shares are actually owned by a foreign state.

The notion that FSIA apples under these circumstances is inconsistent with the statute's text and purpose. By defining "foreign state" as an entity 50% or more of whose shares are owned by a foreign state, Congress clearly indicated its intention that FSIA apply only to those entities wherein a majority interest is owned by a foreign state. To accept the Airbus Defendants' arguments would severely eviscerate the 50% requirement. Quite simply, and in direct contradiction to the statute's plain language, FSIA would apply to numerous entities even though less than 50% of their shares were owned by a "foreign state" *as Congress has chosen to define that term.* The Court finds nothing to indicate that Congress intended that FSIA be so applied.[4] No court has

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[4] The enactment of FSIA did not create a new federal cause of action or change the substantive law concerning the liability of foreign states. *First Nat'l City Bank v. Banco Para El Comercio Exterior*, 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Rather, in enacting FSIA, Congress intended only to codify the restrictive theory of sovereign immunity. *See, e.g., LeDonne v. Gulf Air, Inc. supra*, 700 F.Supp. at 1405. The Court has found no pre-FSIA cases approving the type of pooling suggested by the Airbus Defendants, or, indeed, any type of

ever approved an such application,[5] and the Court, in the absence of any Congressional directive whatsoever, declines to craft a new rule that would substantially broaden the reach of FSIA.

Therefore, the Court holds that the Airbus Defendants have not met their burden of proof; FSIA does not apply to Airbus

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pooling.

[5] The Airbus Defendants argue that the unreported decision in *Aluminum Distrib., Inc. v. Gulf Aluminum Rolling Mill Co.*, No. 87-C-6477, 1989 WL 64174 (N.D.Ill. June 8, 1989) ("GARMCO") supports their position. It does not. In GARMCO the ownership of the defendant's stock was as follows: Bahrain owned 25.47%; Iraq owned 11.32%; Oman owned 5.66%; Qatar owned 5.55%; Gulf Investment Corporation, a Kuwait shareholding company owned by Bahrain, Saudi Arabia, Oman, Qatar, Kuwait and the United Arab Emirates, owed 14.5%; and Saudi Basic Industries Corp., 70% of whose ownership was heid by Saudi Arabia, owned 20.75%. In addition, 16.98% was owned by the Industrial Bank of Kuwait, which was 31.4% owned by Kuwait.

The Airbus Defendants assert that, given this last fact, GARMCO can be read as support for the proposition that entity's which are partially owned by foreign states but are not themselves foreign states may nevertheless pool their ownership interest in a third entity for purposes of determining whether that third entity is a foreign state for FSIA purposes. Nowhere in its opinion, however, does the GARMCO court reach such a conclusion. Instead, the court merely stated in its recitation of facts, the fact that the 16.98% of the defendant's shares were held by the Industrial Bank of Kuwait. The court then rejected the plaintiff's contention that to be a foreign state, more than 50% of an entity's shares must be held by a single foreign state and held that the defendant was a foreign state. In GARMCO, in contrast to the instant case, more than 50% of the defendant's shares were owned by entities *which were themselves foreign states*. Thus, the court did not need to consider whether the Industrial Bank of Kuwait could pool its ownership interests with the others, and consequently, the court did not address this issue.

Industrie and Aeroformation because Deutsche Airbus GmbH is not a foreign state for purposes of FSIA.[6]

IT IS SO ORDERED.

DONE at Galveston, Texas this 21st day of July, 1992.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT COURT

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[6] Similarly, in the Court's view, MBB, which owns 80% of DA, should not be allowed to pool its interest because it is also not a foreign state.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LAURA HOWELL LINTON, ET AL., Plaintiffs,	§	
v.	§	CIVIL ACTION NO. G-92-102
AIRBUS INDUSTRIE, ET.AL., Defendants.	§	
MR. & MRS. STAN MOSS, ET AL., Plaintiffs,	§	CONSOLIDATED WITH
v.	§	CIVIL ACTION NO. G-92-103
AIRBUS INDUSTRIE, ET AL., Defendants.	§	

ORDER

This Court grants the Airbus Defendants' Motion to Stay. This Court's order of remand, dated June 24, 1993, is stayed pending final determination of the Airbus Defendants' Foreign Sovereign Immunities Act appeal.

SIGNED this 29th day of June, 1993.

/s/ Samuel B. Kent
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7479

LAURA HOWELL LINTON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATES OF ANDREW JAY HOWELL AND SARAH STOLL HOWELL, DECEASED, AND ON BEHALF OF RENA HOWELL, ET AL.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE and AEROFORMATION,
Defendants-Appellants.

* *

MR. AND MRS. STAN MOSS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATORS OF THE ESTATE OF ALISON LESLIE MOSS,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE and AEROFORMATION

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/16/94, 5 Cir., 1994, ____ F.3d ____)

(09/13/94)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Jacques L. Wiener, Jr.
United States Circuit Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7479

D.C. Docket No. CA G92 102 c/w G92 103

LAURA HOWELL LINTON, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATES OF ANDREW JAY HOWELL AND SARAH STOLL HOWELL, DECEASED, AND ON BEHALF OF RENA HOWELL, ET AL.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE and AEROFORMATION,
Defendants-Appellants.

* * * * * * * * * * * * * * * * * *

MR. AND MRS. STAN MOSS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATORS OF THE ESTATE OF ALISON LESLIE MOSS,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIES and AEROFORMATION,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, KING, and WIENER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjuged by this Court that the appeal in this cause is dismissed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: August 16, 1994

APPENDIX I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CA-G-92-102

No. 92-7564

AIRBUS INDUSTRIE, ET AL.,
Appellants/Defendants,

versus

LAURA HOWELL LINTON, ET AL.,
Appellees/Plaintiffs.

Appeal from the United States District Court
for the Southern District of Texas

(February 24, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss appeal is GRANTED.

The district court's finding—that the Foreign Sovereign Immunities Act (FSIA"), 28 U.S.C.A. § 1602 *et seq.* (West Supp. 1992) "does not apply to Airbus Industrie and Aeroformation [("Airbus Defendants")] because Deutsche Airbus GmbH is not a foreign state for the purposes of FSIA"—did not dispose of plaintiffs' motion to remand nor

Airbus defendants' various motions to dismiss. *See Linton v. Airbus Industrie*, 794 F. Supp. 650, 653-54 (S.D.Tex. 1992). Accordingly, the district court's order is neither final nor appealable under 28 U.S.C. § 1291 (1988). *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, — U.S. —, 113 S. Ct. 684, 687 (1993) ("Appeal is thereby precluded 'from any decision which is tentative, informal or incomplete,' as well as from any 'fully consummated decisions, where they are but steps towards final judgment in which, they will merge.'" (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L. Ed. 1528 (1949))).

Moreover, the Airbus defendants failed to seek certification of the district court's order pursuant to 28 U.S.C. § 1292(b) (1988) for discretionary review by this Court. Accordingly, this Court lacks appellate jurisdiction pursuant to 28 U.S.C. § 1292.

Lastly, we have not found, nor have we been referred to, any authority to support that the district court's preliminary finding—that FSIA does not apply to Airbus Industrie and Aeroformation—is appealable under the collateral order doctrine, absent a ruling on the motion before it. *See United States v. Moats*, 961 F.2d 1198, 1201 (5th Cir. 1992) (finding that the court had appellate jurisdiction from a non-final order denying a motion to dismiss based on FSIA immunity). The district court having failed to determine Airbus defendants' motions to dismiss, we lack jurisdiction under the collateral order rule. *See id.* (finding appellate jurisdiction under the collateral order doctrine where no other pending motions before it.

On remand, the district court should rule on plaintiffs' motions to remand and defendants' motions to dismiss expeditiously.

ISSUED AS MANDATE: MAR 29 1993

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7564

LAURA HOWELL LINTON,
Individually, Etc., ET AL.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE, AIRBUS INDUSTRIE OF NORTH AMERICA, INC., ET AL.,
Defendants-Appellants.

* * * *

MR. AND MRS. STAN MOSS,
Individually, Etc.,
Plaintiffs-Appellees,

versus

AIRBUS INDUSTRIE, ET AL.,
Defendants,

AIRBUS INDUSTRIE, AIRBUS INDUSTRIE OF NORTH AMERICA, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

(March 18, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for reconsideration of this Court's order of February 24, 1993 dismissing the appeal is denied.